IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
THIS DOCUMENT RELATES TO: G-02-299	§	
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	
AMERICAN NATIONAL INSURANCE COMPANY, AMERICAN NATIONAL INVESTMENT ACCOUNTS, INC., SM&R INVESTMENTS, INC., AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY, STANDARD LIFE AND ACCIDENT INSURANCE COMPANY, FARM FAMILY LIFE INSURANCE COMPANY, FARM FAMILY LIFE INSURANCE COMPANY, FARM FAMILY CASUALTY INSURANCE COMPANY, AND NATIONAL WESTERN LIFE INSURANCE COMPANY, Plaintiffs	§	
VS.	§	CIVIL ACTION NO. G-02-0299
J.P. MORGAN CHASE AND COMPANY, Defendant.	§	

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action, alleging violations of the Texas Securities Act (a/k/a "the Texas Blue Sky Laws"), Tex. Rev. Civ. Stat. Ann. art. 581-33, and Tex. Bus. & Comm. Code Ann, § 27.01 ("Fraud in Real Estate and Stock

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Transactions"), as amended, and Texas common-law claims of fraud, conspiracy, and negligence, are two motions: (1) Plaintiffs American National Insurance Company, American National Investment Accounts, Inc., SM&R Investments, Inc., American National Property and Casualty Company, Standard Life and Accident Insurance Company, Farm Family Life Insurance Company, Farm Family Casualty Insurance Company, and National Western Life Insurance Company's motion to remand (#810 in H-01-3624) this case to the 56th Judicial District Court of Galveston County, Texas; and (2) JPMorgan Chase & Co.'s ("JPM's") motion to dismiss Plaintiffs' original petition (#870)

In this suit Plaintiffs allege that from JPM's agreements with Enron, JPM knew or should have known that Enron's purported trading of oil and natural gas contracts through a company known as "Mahonia, Ltd." was actually a mechanism for transferring losses from one financial reporting period to another to allow Enron to mislead investors and shareholders purchasing Enron stock, bonds, preferred stock, commercial paper and other securities about the actual financial status of Enron.

This suit was initially removed from the 56th Judicial District Court of Galveston County, Texas to the United States District Court, Galveston Division, Southern District of Texas, by JPM and subsequently transferred to and consolidated into Newby, now pending before the undersigned judge in the Houston Division. In its Notice of Removal, JPM asserted that this Court has federal-question subject-matter jurisdiction and presented three alternative grounds for removal: (1) supplemental jurisdiction under 28 U.S.C. § 1367(a) (". . . [I]n any civil action of which

alternative grounds for removal: (1) supplemental jurisdiction under 28 U.S.C. § 1367(a) (". . . [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution") on the grounds that Plaintiffs' claims are so related to those already pending before this Court in Newby, all based on a common nucleus of operative facts, that they constitute part of the same case or controversy; (2) preemption by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, codified as amended in part at 15 U.S.C. §§ 77p(b) and 78bb(f); and (3) pursuant to 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11") and § 1452(a) ("A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under § 1334 of this title.") because the claims or causes of action are related to the Enron Corporation Chapter 11 bankruptcy.

Defendant bears the burden of demonstrating that the federal jurisdictional requirements for removal asserted here have been satisfied. Manguno v. Prudential Property and Casualty Co., 276 F.3d 720, 723 (5th Cir. 2002). Moreover, a party opposing a motion to remand bears the burden of demonstrating federal subject

matter jurisdiction. Green v. Ameritrade, 279 F.3d 590, 596 (8th Cir. 2002)(SLUSA issue). Defendant also bears the burden of demonstrating that the removal was procedurally proper. Manguno, 276 F.3d at 723. "[A]ny ambiguities [in the state court petition] are construed against removal because the removal statute should be strictly construed in favor of remand." Id., citing Acuna v. Brown & Root, Inc., 200 F.3d 335, 339 (5th Cir. 2000).

The first two bases for removal were previously raised and rejected by this Court in another member case, G-02-0084, American National Ins. Co. et al. v. Arthur Andersen L.L.P. et al., brought by the same Plaintiffs as here. For the same reasons the Court rejects them here.

Regarding Defendant's first ground for removal, supplemental jurisdiction, Plaintiffs charge JPM with "turn[ing] the supplemental statute on its head by arguing that 28 U.S.C. §§ 1441 and 1367 allow removal of state law claims even when no federal question is raised in Plaintiffs' petition," and with "do[ing] away with the well-pleaded complaint rule."

This Court agrees with Plaintiffs that JPM's supplemental jurisdiction argument has the proverbial "cart before the horse." There can be no supplemental jurisdiction without the existence initially of original federal subject matter jurisdiction over at least some of the claim in the same suit, at the point it is either filed in or removed to federal court. Peacock v. Thomas, 516 U.S. 349, 354-55 (1996); Franceskin v. Credit Suisse, 214 F.3d 253, 258 & n.2 (2d Cir. 2000); Ortlof v. Silver Bar Mines, Inc., 111 F.3d 865, 867 (9th Cir. 1997), as

amended on denial of rehearing (June 10, 1997); Phelps v. Nationwide Ins. Co., No. 01-4342, 2002 WL 1334757, *2 (6th Cir. 2002).

Plaintiffs contend that JPM's second ground for removal is frivolous because this suit does not qualify as a "covered class action" under SLUSA. The Court concurs here, also.

Under the well-pleaded complaint rule and SLUSA's definitions of its scope, no federal question jurisdiction was created by Plaintiff's original state-law petition, since, as discussed below, it is not a "covered class action" and no consolidation with any other state-court, Enron-related securities suits was requested of nor ordered by the state court.

SLUSA states in part that "no covered class action based upon the statutory or common law of an State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security . . . ." Plaintiffs assert claims under Texas statutes and common law. Generally federal jurisdiction exists only if the federal question is facially evident in the plaintiff's well-pleaded complaint. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); Terrebonne Homecare, Inc. v. SMA Health Plan, Inc., 271 F.3d 186, 188 (5th Cir. 2001). Moreover, a plaintiff is master of his complaint and may choose the law, on which he wishes to rely to avoid removal to federal court. Carpenter v. Wichita Falls Indep. School Dist., 44 F.3d 362, 366 (5th Cir. 1995).

As a narrow exception to the well pleaded complaint rule, the artful pleading doctrine, applies where federal law completely preempts the field and prevents a plaintiff from precluding removal by failing to plead necessary federal questions. Id.; Waste Control Specialists, LLC v. Envirocare of Texas, Inc., 199 F.3d 781, 783 (5th Cir. 2000), citing Rivet v. Regions Bank of La., 522 U.S. 470 (1998)("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. . . . Although federal preemption is ordinarily a defense, once the area of state law has been completely considered, any claim purportedly based on the pre-empted state law is considered from its inception, a federal claim and therefore arises under federal law."). Thus Defendant bears the burden of demonstrating that a federal right is an essential element of Plaintiffs' claims and that Congress intended SLUSA to preempt Plaintiffs' claims.

Federal law may preempt state law in any of three ways: (1) Congress may expressly define the extent to which it intends to preempt state law; (2) Congress may indicate an intent to occupy an entire field of regulation; or (3) Congress may preempt a state law that conflicts with federal law even when it has not expressly preempted the state law nor indicated an intent to occupy the field. New Orleans Public Service, Inc. v. Council of City of New Orleans, 911 F.2d 993, 9998 (5th Cir. 1990)(citing Michigan Canners and Freezers Assoc. v. Agricultural Marketing and

Bargaining Board, 467 U.S. 461, 469 (1984)), cert. dismissed, 502 U.S. 954 (1991).

Congress has enacted several federal statutes in the past few years to attempt to establish uniformity in the securities markets. The Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1, 78u, which amended the 1933 Securities Act and the 1934 Securities Exchange Act, set out heightened pleading requirements[1] and for complaints under Rule 10b-5, mandated pleading of specific facts creating a strong inference of scienter for private class actions and other suits alleging securities fraud in an effort to minimize meritless lawsuits. 15 U.S.C. § 78 et seq. H. Conf. Rep. No. 105-803 (1998). When, as a result, plaintiffs began filing in state rather than federal court, asserting claims under state statutory or common law to avoid the PSLRA's stringent procedural and pleading hoops, Congress passed SLUSA in 1998 to close the loophole. 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998, 1998 WL 712049). SLUSA in essence made federal court the exclusive venue for securities fraud class actions meeting its definitions and ensured they would be governed exclusively by federal law. 15 U.S.C. § 77p(b)-(c). Congress' purpose in enacting the statute was to "'prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing

[1] The PSLRA requires plaintiffs to plead with particularity any alleged misrepresentations, misleading statements or omissions, including the reasons why plaintiffs think there was an omission or which statements were misleading and why.

suit in State court, rather than Federal court.'" Korsinsky v. Salomon Smith Barney, Inc., No. 01 6085(SWK), 2002 WL 27775, *3 (S.D.N.Y. 2002) quoting H.R. Conf. Rep. No. 105-803 (1998). Moreover, the Court observes that the same report indicates that in SLUSA Congress did not evidence an intent to occupy the entire field of securities regulation, but expressly delineated the scope of preemption:

> [I]n order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

H.R. Conf. Rep. 105-803, *2.

With respect to removal, the plain language of SLUSA, 15 U.S.C. § 77p(c), reveals Congress' intent to preempt a specific category of state-law class actions, which it defines as follows: "Any covered class action brought in any State Court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending . . . ." Title 15 U.S.C. § 78bb(f)(5)(B) defines a "covered class action" as

> (i) any single lawsuit in which--
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominated over any question

> affecting only individual persons or members or
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or
> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--
> (I) damages are sought on behalf of more than 50 persons; and
> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B).

SLUSA provides for mandatory removal and dismissal of a specific kind of class action:

> (f) LIMITATIONS ON REMEDIES.--
> (1) CLASS ACTION LIMITATIONS.--No covered class action based upon the statutory or common law of any state or subdivision thereof may be maintained in any State or Federal court by any private party alleging--
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
> (2) REMOVAL OF COVERED CLASS ACTIONS.--Any covered class action brought in an State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

15 U.S.C. § 78bb(f)(1)(A),(B) & (2). Thus SLUSA authorizes the removal of all private actions that are actually traditional securities claims that fall within its ambit to federal court and makes the state law claims subject to dismissal. 15 U.S.C. §

78bb(f)(1)-(2). See, e.g., Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1341 (11th Cir. 2002); Patenaude v. Equitable Life Assurance Soc. of U.S., 290 F.3d 1020, 1023-24 (9th Cir. 2002); Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 109-10 (2d Cir. 2001).

Plaintiffs have emphasized that they are composed of only eight entities that do not seek damages on behalf of others similarly situated, and that the instant suit was not consolidated by the state court with any other state court securities actions. The Court agrees that because of these facts, G-02-299 is not a "covered class action" under SLUSA, and therefore there is no preemption by the statute or federal-question jurisdiction based on such preemption. JPM cannot rely on the argument that once G-02-299 was consolidated with other Enron-related litigation in Newby, it became part of a covered class of more than fifty plaintiffs. This Court must have federal-question and removal jurisdiction at the time of removal before it has the power to consolidate this case with Newby.

Defendant's third purported ground for removal is "related to" bankruptcy jurisdiction under § 1334 because JPM "may have an action against Enron for indemnity or contribution." Plaintiffs, emphasizing that Enron's bankruptcy proceedings are in the Southern District of New York before United States Bankruptcy Judge Arthur Gonzales, and not in this Court, furthermore call the argument "a red herring because the controversy between Plaintiffs and JPM does not concern the same questions of fact or law as, and

will not impact, Enron's bankruptcy proceeding. They argue that under JPM's bankruptcy jurisdiction theory, "the entire Newby action should immediately be transferred to the New York bankruptcy court where Enron's bankruptcy is pending." Motion to remand at 2. They also complain that "JPM provides only conclusory allegations concerning the potential for contribution and indemnity claims and fails to analyze each of American National's claims and the relationship of each claim to the bankruptcy proceeding." Halper v. Halper, 164 F.3d 830, 838 (3d Cir. 1999)(to determine the extent of the bankruptcy court's jurisdiction in each case, each of the claims presented must be examined to ascertain if it is core, non-core, or wholly unrelated to a bankruptcy case).[2] They maintain that their claims against JPM "are so remote from the Enron bankruptcy issues that it is inconceivable that American National's actions could interfere with or impact the bankruptcy proceedings." They also emphasize that JPM only alleges that his suit "may" affect the bankruptcy proceeding, but fails to show an actual nexus between their specific state-law claims and the bankruptcy proceeding.

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[2] JPM correctly objects that this case is not relevant to the issue before this Court because the Third Circuit was addressing the scope of the bankruptcy court's power to adjudicate core or non-core claims and the district court's standard of review, not whether a claim should be remanded to state court. Opposition at 18-19. This Court would refer the parties to Wood v. Wood (In re Wood, 825 F.2d 90, 97 (5th Cir. 1987), in which the Fifth Circuit held that if a proceeding does not invoke a substantive right created by Title 11, is based on state law, and could exist outside of the bankruptcy, it is a non-core proceeding over which the bankruptcy court might have "related to" jurisdiction if the claim has a potential effect on the debtor's estate.

Specialty Mills, Inc. v. Citizens State Bank, 51 F.3d 770 (8th Cir. 1995). They point out that JPM never sought to transfer the Newby action to the Southern District of New York and has not joined Enron and other defendants to this suit nor indicated that it will file third-party actions against them. Nor has it shown that its proposed contribution or indemnity claims, if they could be and are asserted, could conceivably affect the administration of the bankrupt estate, especially in light of the large number of secured/priority creditors and the limited pool of Enron assets.

JPM responds that as holders of preferred stocks, bonds, and commercial paper of Enron, as recited in paragraph 18 of their petition, Plaintiffs are claimants in Enron's bankruptcy and this action will potentially affect those claims. Moreover, depending on the outcome of this action, which is permissible under Tex. Civ. Prac. & Rem. Code Ann. § 32.012 (Vernon's 2002), JPM may have rights to contribution directly from Enron's estate and from Enron's directors and officers, whose liability insurance policies of approximately $450 million are part of Enron's estate. Ex. E (Motion of Certain Present and Former Directors of Enron Corporation for Relief from the Automatic Stay to Obtain Payment and/or Advancement of Defense Costs under the Debtors' Directors and Officers Liability Insurance and ERISA Fiduciary Insurance Policies, filed in In re Enron Corp., et al., Civil Action No. 01-16034 (Bankr. S.D.N.Y. Mar. 21, 2002)) to JPM's opposition (#887). Any of these claims "could alter the debtor's rights, liabilities options, or freedom of action" or otherwise affect "the handling

or administration of the [Enron] bankrupt estate." Federal Deposit Ins. Corp. v. Majestic Energy Corp. (In re Majestic), 835 F.2d 87, 90 (5th Cir. 1988). Thus Enron and its assets are potentially exposed to liability through this suit.

JPM also explains that it did not remove this action to the bankruptcy court in which the Enron Chapter 11 proceedings are pending because the policy behind the broadly defined "related to" bankruptcy jurisdiction is "to avoid the inefficiencies of piecemeal adjudication and promote judicial economy by aiding in efficient and expeditious resolution of all matters connected to the debtor's estate." Feld v. Zale Corp. (In re Zale), 62 F.3d 746, 752 (5th Cir. 1995). Noting that this Court is the central repository for the vast majority of Enron-related securities actions and the forum designated as the MDL venue for Enron litigation and pretrial proceedings, "in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to questions of class certification), and conserve the resources of the parties, their counsel and the judiciary," in the words of the Joint Panel on Multidistrict Litigation, JPM maintains that Judge Gonzales has recognized that in the interests of justice and economic and efficient case administration this Court is the appropriate forum for certain adversary proceedings relating to the bankruptcy estate of Enron.

This Court agrees with JPM. While all federal courts are courts of limited jurisdiction, defined by the Constitution and statute, a bankruptcy court's jurisdiction is even more

restricted and wholly defined by statute. 28 U.S.C. § 1334(b)(granting jurisdiction to district courts and adjunct bankruptcy courts to hear proceedings "arising under," "arising in a case under" or "related to" a case under Title 11 U.S.C.); Bass v. Denney (In re Bass), 171 F.3d 1016 (5th Cir. 1999).

The test for "related to" bankruptcy jurisdiction is whether "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." In re Canion, 196 F.3d 579, 585 (5th Cir. 1999); In re Woods, 825 F.2d 90, 93 (5th Cir. 1987)(adopting, like the majority of circuit courts of appeals,[3] the test from Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)(holding that an action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate")). The Fifth Circuit construes the Pacor test as conjunctive: for jurisdiction, the court must find that the action conceivably could both alter the rights, obligations, and choices of action of the debtor and could have an effect on the administration of the estate. In re Bass, 171 F.3d at 1022. Certainty or likelihood of a successful outcome is not required. In re Canion, 196 F.3d at 587 & n. 30.

Proceedings that are "related to" a bankruptcy case and are therefore within the ambit of federal bankruptcy jurisdiction,

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[3] See Celotex Corp. v. Edwards, 513 U.S. 300, 308 n.6 (1995)(observing that the First, Fourth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have adopted the Pacor test).

include (1) causes of action belonging to the debtor that become the property of the debtor's estate and (2) suits between or among third parties that have an effect on the bankruptcy estate. Bankr. Code, 11 U.S.C. § 541; 28 U.S.C. § 1334(b); Arnold v. Garlock, Inc., 278 F.3d 426, 434 (5th Cir. 2001), citing Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.5 (1995). JPM's potential claims for contribution and indemnity fall within the second group. Arnold, 278 F.3d at 434-35 (observing that a claim for contribution may be an adequate basis for "related to" bankruptcy jurisdiction); In re Dow Corning, 86 F.3d 482, 490-94 (6th Cir. 1996)(finding that claims for indemnification and contribution can affect the size of the debtor's estate, the duration of the bankruptcy proceedings, and the debtor's ability to reorganize); Canion, 196 F.3d at 586 ("[A] claim between two nondebtors that will potentially reduce the bankruptcy estate's liabilities produces an effect on the estate sufficient to confer 'related to jurisdiction."); Belcufine v. Aloe, 112 F.3d 633, 636-37 (3d Cir. 1997)(Pacor test and court's finding that contractual indemnity claims conceivably could have an effect on the bankruptcy estate supported "related to" bankruptcy jurisdiction over suit between employees of bankrupt company and non-debtor officers). Clearly JPM's claims for contribution and indemnity both alter the rights, obligations, and choices of action of the debtor and have an effect on the administration of the estate and the debtor's reorganization. Moreover JPM is named as a defendant in the consolidated class action complaints in Newby v. Enron

Corporation, H-01-3624, and Tittle v. Enron Corp., H-01-3913, MDL 1446, raising the specter of a significant impact on Enron's bankrupt estate should JPM's potential claims for indemnity and contribution succeed.

Furthermore, the Court agrees that removal to this Court is appropriate under the unusual, if not unique, relationship that the collapse of Enron has created between Judge Gonzales' activities in the bankruptcy case in the Southern District of New York and the centralization of the Enron-related civil cases in this Court. Judge Gonzales and the undersigned judge have necessarily worked closely in administering and coordinating the proceedings, with Judge Gonzales recognizing the convenience and economy provided by this forum and transferring Enron-related cases and matters to Houston. This Court has no doubt that had this case, which shares some of the same common nucleus of facts at issue in MDL 1446, been removed to New York, it, too, would have been transferred here for coordination with MDL 1446, in which JPM is a named Defendant.

Alternatively, Plaintiffs have asked this Court to abstain pursuant to 28 U.S.C. § 1334(c), which provides for both permissive and mandatory abstention in such circumstances as those present here:

> (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Plaintiffs maintain that this suit satisfies the criteria for mandatory abstention under § 1334(c)(2) because (1) they have made a timely motion, (2) the suit involves only state-law claims. (3) Defendant has removed on purported "related to" bankruptcy jurisdiction and not because the suit "arises in" or "arises under" title 11, (4) there is no federal jurisdiction without the asserted "related to" bankruptcy jurisdiction. (5) the suit was commenced in state court, (6) the state court suit may be timely adjudicated, and (7) the state had jurisdiction over all the claims. In re Enqra, Inc., 86 B.R. 890, 894 (Bankr. S.D. Tex. 1988); In re Chiodo, 88 B.R. 780, 786-87 (Bankr. W.D. Tex. 1988).

Alternatively, Plaintiffs ask the Court to abstain in the interests of comity with the Texas courts and respect for Texas state law pursuant to § 1334(c)(1).

Plaintiffs maintain that remand based on either mandatory or permissive abstention is proper. Southmark Corp. v. Coopers Lybrand, 163 F.3d 925, 929 (5th Cir. 1999)(statutory abstention applies in the removal/remand context), cert. denied, 527 U.S. 1004 (1999).

The party that moves for abstention has the burden of establishing that it is appropriate. In re DeMert & Dougherty, Inc., 271 B.R. 821, 842 (Bankr. N.D. Ill. 2001).

Although JPM argues that mandatory jurisdiction under § 1334(c) is not applicable because there are other bases for jurisdiction than "related to" bankruptcy jurisdiction, this Court has found otherwise in rejecting its arguments in favor of supplemental jurisdiction and SLUSA preemption. Nevertheless, the Court agrees that Plaintiffs have conclusorily asserted, but failed to show that this action "can be timely adjudicated . . . in a State forum of appropriate jurisdiction" to warrant mandatory abstention here. 28 U.S.C. § 1334(c)(2).

Plaintiffs have the burden of demonstrating the timely adjudication element, but the "'naked assertion that the matter can be timely adjudicated in state court, without more, is insufficient to satisfy the requirement.'" Renaissance Cosmetics, Inc. v. Development Specialists, Inc., 277 B.R. 5, 14 (S.D.N.Y. 2002), citing In re Allied Mech. and Plumbing Corp., 62 B.R. 873, 878 (Bankr. S.D.N.Y. 1986), and In re Burgess, 51 B.R. 300, 302 (Bankr. S.D. Ohio 1985). When the parties disagree whether an action can be timely adjudicated in state court, the moving party, here Plaintiffs, bears the burden of persuasion. DeMert & Dougherty, 271 B.R. at 843.

The transactions challenged in this suit are very complicated, highly sophisticated, and interrelated with numerous other parties named and issues raised in MDL-1446, which this Court

has been presiding over for some time. This Court has set an expedited schedule coordinating pretrial matters and a December 1, 2003 trial date, which it is optimistic can be met. In contrast, G-02-299 was removed almost immediately from state court, which had minimal, if any, opportunity to review the substantive claims or become familiar with the law, while this Court has been involved in the substantive claims since early this year. Other member cases in Newby have asserted state-law claims, and JPM is a defendant in the consolidated action. Moreover, given the necessity of orderly proceedings in such a massive litigation, this Court, in aid of its jurisdiction, has had to enjoin state court cases from discovery that would interfere with that schedule. Thus there is a serious question whether this case could be adjudicated in a timely fashion in state court. Furthermore, in light of the number of claimants and the limited pool of Enron assets, settlement negotiations will be facilitated where the suits are in one court.

Finally, this Court finds that permissible abstention is not appropriate. In deciding whether the Court should exercise its discretion to abstain under § 1334(c)(1), it should consider twelve factors: (1) the effect on the efficient administration of the bankruptcy estate if the Court abstains; (2) the extent to which state-law issues predominate over bankruptcy issues; (3) whether the law is difficult or unsettled; (4) whether a related proceeding has commenced in state or other non-bankruptcy court; (5) whether there is another jurisdictional basis besides § 1334; (6) how closely related the suit is to the bankruptcy case; (7) the

substance, as opposed to the form, of the action; (8) whether state-law claims can be severed from the core bankruptcy matters to allow judgments to be made by the state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceedings in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. Flores v. Baldwin, No. CIV. A. 301CV2873P, 2002 WL 1118504, *6-7 (N.D. Tex. May 28, 2002), citing In re Republic Reader's Serv., Inc., 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987). "Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative." Chicago, Milwaukee, St. Paul & Pacific R. Co., 6 F.3d 1184, 1189 (7th Cir. 1993).

As with the issue of mandatory abstention, this Court finds that the highly unusual nature and size of the consolidated proceedings in MDL 1446 and the necessity for efficient administration in a single court deserve significant consideration. The Court notes that this suit was removed just after it was filed and thus the state court did not become familiar with the issues. In contrast, because of claims in the Enron-related suits before it, this Court has become very knowledgeable about the parties, the issues, and the law that are involved in various Plaintiffs' claims against JPM arising out of Enron's financial collapse. Even though the instant suit is based only upon state law, involves

adjudication of rights between nondebtor parties, and is a "related to" or non-core proceeding,[4] it is intimately related to the other cases consolidated into Newby and will involve overlapping discovery. This Court, like the state court where the suit was commenced, is a convenient Texas forum. Should a trial be necessary and should this case not be returned to state court for such a proceeding, this Court can provide a jury trial. Furthermore, the addition of this suit will not burden this Court, but in fact greatly facilitate coordinating the litigation and possible settlement. For the same reasons that the Enron-related civil suits were consolidated in this Court for coordinated discovery and pretrial matters and that the Multi-District Litigation Panel designated this Court as the site for the Enron multi-district litigation, and to avoid duplicative efforts in the state court and interference with the orderly proceeding of a massive MDL litigation, this Court finds that the suit should proceed here. Furthermore, the presence of the MDL litigation and the policies behind it override any concerns that Defendant might be forum shopping; instead, these factors suggest that Plaintiffs were forum-shopping in filing their suit in state court after the consolidated Newby action had been created.

JPM has also moved to dismiss Plaintiffs' original petition on four grounds: (1) for the same reasons stated in JPM's motion to dismiss the Newby consolidated complaint (#632); (2)

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[4] See Wood v. Wood (In re Wood), 825 F.2d 90, 96 (5th Cir. 1987).

dismissal of state-law claims pursuant to SLUSA, 15 U.S.C. § 78bb(f) and 77p(c); (3) failure to plead fraud claims with particularity as required by Fed. R. Civ. P. 9(b); and (4) failure to alleged key elements of their claims, specifically that JPM had a duty to disclose material facts relating to the Mahonia trades and failure to allege actual reliance on any statement or omission of JPM in purchasing Enron securities to support Plaintiffs' fraud claim.

The Court concludes that because Plaintiffs have asserted only state-law claims, which remain viable because they are not preempted by SLUSA, JPM's motion (#632) to dismiss the Newby claims against it is not relevant. Furthermore, Defendant's second ground is now moot in light of this Court's determination that SLUSA did not preempt Plaintiffs' state-law claims.

Plaintiffs argue that dismissal pursuant to Rule 9(b) or 12(b)(6) is improper. First, the petition was filed in state court under state-court pleading standards. Second, a complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 255 U.S. 41, 45-46 (1957). Moreover, they argue that they have not pled specific facts because JPM is in possession of the information and no discovery has been taken. When the information is only within the knowledge of the opposing party, Rule 9(b)'s

particularity-in-pleading requirement[5] may be relaxed. Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987); Schilk v. Penn-Dixie Cement Corp., 507 F.2d 374, 379 (2d Cir. 1974), cert. denied, 421 U.S. (1975); The Cadle Co. v. Schultz, 779 F. Supp. 392 (N.D. Tex. 1991("if the information surrounding the allegations is peculiarly within the knowledge of the defendant, less detail is required in the complaint"); Michaels Bldg. Co. v. Ameritrust Co., 848 F.2d 674, 680 (6th Cir. 1974)("It is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim through evidence unturned in discovery. Rule 9(b) does not require omniscience; rather the Rule requires that the circumstances of the fraud be pled with enough specificity to put the defendants on notice as to the nature of the claim.").

This Court agrees with Plaintiffs. Rule 9 must be read in conjunction with Rule 8, under which a complaint need only provide the opposing party with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." A plaintiff satisfies Rule 9 if he pleads the circumstances constituting the fraud sufficiently to allow the defendant to file an adequate answer. 5 C. Wright & A. Miller, Federal Practice & Procedure § 1298, at 415 (1969). Moreover, the Court notes that with JPM's role in the Enron collapse currently under investigation by Congress, information is being released daily about JPM's role in the debacle, enough to allow Plaintiffs to file an amended

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[5] Rule 9(b) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . ."

complaint that would pass muster. This is not a case subject to the PSLRA, and discovery will allow Plaintiffs to explore the facts relating to their claims more thoroughly.

Accordingly, for the reasons stated above, the Court concludes that it has "related to" bankruptcy jurisdiction over G-02-299 and that abstention is not warranted. It further determines that this action should not be dismissed at this juncture. Accordingly the Court

ORDERS that Plaintiffs' motion to remand (#810) is DENIED and JPM's motion to dismiss (#870) is DENIED. Plaintiffs shall file an amended pleading within twenty days of receipt of this order.

SIGNED at Houston, Texas, this 9th day of August, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE